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February 5, 1996

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FEDERAL COMMUNICATIONS COMMISSION
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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

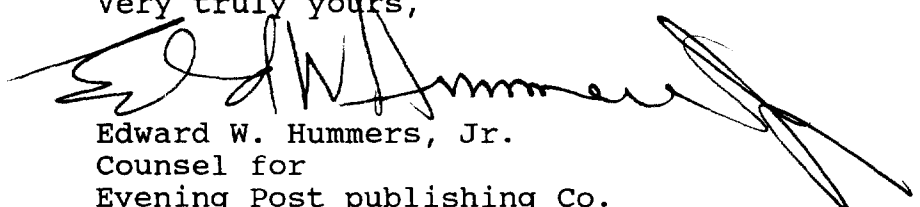
Re: CS Docket No. 95-178
Definition of Markets for Purposes of
the Cable Television Mandatory Television
Broadcast Signal Carriage Rules

Dear Mr. Caton:

Transmitted herewith, on behalf of Evening Post Publishing Co., Hubbard Broadcasting, Inc., Paxson Communications Corporation and Wabash Valley Broadcasting Corporation are an original and 9 copies of their Joint Comments in the above-referenced docket.

Should there be any questions, please contact the undersigned.

Very truly yours,



Edward W. Hummers, Jr.
Counsel for
Evening Post publishing Co.
Hubbard Broadcasting, Inc.
Paxson Communications Corporation
Wabash Valley Broadcasting Corporation

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**Before the
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| In the Matter of |) | |
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| Definition of Markets for Purposes of the |) | |
| Cable Television Mandatory Television |) | CS Docket No. 95-178 |
| Broadcast Signal Carriage Rules |) | |

To the Commission:

JOINT COMMENTS

Evening Post Publishing Co., Hubbard Broadcasting, Inc., Paxson Communications Corporation and Wabash Valley Broadcasting Corporation ["Joint Parties"],¹ by their attorneys, hereby submit their comments in the above-captioned proceeding.²

Introduction

Television stations' initial 1993 must-carry rights were determined based on 1991-1992 ADI ("Area of Dominant Influence") market definitions. The ADI was a market concept developed and used by the Arbitron audience research organization which assigns every county (or, in some cases, discrete portions of counties) to a particular television market based on market stations' measured viewing patterns. However, Arbitron has terminated its television audience research service and its

¹ The Joint Parties, directly or indirectly, are the licensees of multiple television stations. They thus have a substantial interest in the outcome of this proceeding.

² *Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules*, Notice of Proposed Rule Making, CS Docket No. 95-178, FCC 95-489 (December 8, 1995) ["Notice"].

compilation and publication of ADI definitions. Commission rules which rely on ADI definitions for their implementation thus must either be revised to incorporate a more current measure of television markets or continue to use what will be increasingly outdated ADI definitions.³ The *Notice* herein seeks comments on replacing the ADI by Nielsen's Designated Market Area ("DMA") for purposes of television stations' 1996 and successive must-carry elections.⁴

The DMA Should Be Used as the Market Standard for
1996 and Subsequent Must-Carry/Retransmission Consent Elections

The Joint Parties urge the Commission to utilize the DMA to define television stations' markets for purposes of their 1996 and subsequent must-carry/retransmission consent elections. The DMA has replaced the now-extinct ADI for all commercial purposes and is now the standard television industry measure of television markets.⁵ The DMA should likewise replace the ADI for regulatory

³ In addition to the must-carry rule at issue in this proceeding, a number of other Commission rules use ADI market definitions. *See, e.g.*, 73.658(m) [territorial exclusivity]; 73.3555(d)(3)(i) [national television ownership]; 76.51 [television market definitions]; 76.92 [network nonduplication protection].

⁴ "The Designated Market Area (DMA) is a geographic market design that defines each television market exclusive of others, based on measured viewing patterns. Each market's DMA consists of all the counties in which the home market stations receive a preponderance of viewing, and every county is allocated exclusively to one DMA - there is no overlap. The total of all DMAs represents the total television households in the U.S." *Broadcasting & Cable Yearbook 1995* at C-135.

⁵ The *Notice* expressly recognizes that the DMA's design and use are identical to the ADI. *Notice*, par. 6. Indeed, the Commission's existing must-carry rules already use the DMA for Alaska and Hawaii because Arbitron did not publish market definitions for those states.

purposes, at least for purposes of determining television stations' mandatory carriage rights.

Immediate adoption of the DMA as a market standard would comport with Congressional intent. The 1992 Cable Act ("Cable Television Consumer Protection and Competition Act of 1992", Pub. L. No. 102-385, 106 Stat. 1460 [1992]) directs use of a market measure based on Section 73.3555(d)(3)(i) (redesignated Section 73.3555(e)(3)(i)). Congress' objective in doing so was not based on specific attachment to the ADI, *per se*, but instead was premised on its recognition that ". . . ADI lines establish the markets in which television stations buy programming and sell advertising" and its belief that ". . . ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition."⁶ With the disappearance of the ADI as an accurate current market measure, one need only substitute DMA to replicate Congress' 1992 intent in today's regulatory and commercial environment.

Must-carry rights are designed to ensure that television stations have access to cable subscribers within their actual market areas.⁷ Optimally accurate market definitions are thus critical to ensuring that FCC must-carry regulations fully implement Congress' aims in adopting mandatory cable carriage requirements.

⁶ "Cable Television Consumer Protection and Competition Act of 1992," H.Rep. 102-628, 102d Cong., 2d Sess. (1992) [*House Report*] at 97.

⁷ *See generally House Report* at 50 *et seq.*; "Cable Television Consumer Protection Act of 1991," S.Rep. 102-92, 102d Cong., 1st Sess. (1991) at 41 *et seq.*

Neither of the alternatives suggested by the *Notice* -- continuing to use 1991-1992 ADI market definitions or changing to DMA market definitions, but only after the 1996 elections -- would further Congressional objectives. Use of the 1991-1992 ADI market definitions, even for a short period, would serve no useful purpose and mean that must-carry rights bear a less than optimal relationship to actual market conditions.⁸ By contrast, adopting the DMA now as the relevant market standard would ensure that mandatory carriage rights apply in the areas currently served by television stations.

Congressional goals and the public interest would both be disserved by perpetuating the fictional accuracy of no-longer-extant ADI markets. Rather, FCC rules should recognize contemporary commercial realities of the industry it regulates by adopting the standards which, in fact, are currently used by that industry.

**Immediate Use of the DMA Would Not Create
Instability in the Television Broadcast Signal Carriage Process**

The *Notice's* expressed preference for continuing to use 1991-1992 ADI market definitions is based on its view that doing so would provide "stability in the television broadcast signal carriage process." *Notice* at par. 7. The Joint Parties respectfully submit that this view is mistaken.

The FCC's decision to continue to use its 1972 list of significantly-viewed stations in administering its cable television rules was based on the same type of

⁸ Section 73.3555(e)(3)(i)) by its terms contemplates use of market data as of the date an application is filed. Use of a DMA market which is current with respect to the date of the relevant must-carry/retransmission consent election would comport with this rule's emphasis on the use of the most contemporary and accurate data available.

concern about stability.⁹ The consequent ongoing fiction that 1971 significant viewing lists accurately measure station viewing has created substantial distortions in two decades of cable television regulation. It has cost television stations, cable television systems and the Commission enormous amounts of time and money as entities subject to FCC regulation have struggled to adjust 1971 significant viewing statistics to reflect the market reality of the 1980's and 1990's. That history of needless litigation would repeat itself if the Commission were to continue to utilize ADI market definitions which are already five years old. In short, the public interest would not be served by treating ADI market definitions with the same mistaken deference as 1971 significant viewing statistics.

The *Notice's* concern with stability is not only misplaced as a matter of policy; it is an unwarranted reversal of an earlier determination. The agency decided in 1993 that it would use new market definitions for each successive must-carry/retransmission consent election period¹⁰ and saw no adverse impact on stability:

. . . ADI designations will be set for a three-year period designed to coincide with the three-year election time frame for the must-carry/retransmission consent election. We believe that this procedure will allow us to take into

⁹ See *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 209, 210 (1972); *KCST-TV, Inc.*, 49 RR 2d 1118 (Cable TV Bur. 1981), *rev'd and remanded*, *KCST-TV, Inc. v. FCC*, 53 RR 2d 139 (D.C. Cir. 1983).

¹⁰ The existing must-carry rules provide that 1994-1995 ADI market definitions will be used for the 1996 elections, that the 1997-1998 ADI market definitions will be used for the 1999 elections, and so forth. 47 C.F.R. § 76.55(e), Note.

account changing markets while at the same time providing stability for the affected parties.¹¹

This action recognized and accepted the possibility of differences between each successive ADI market definition, yet that did not deter the Commission from recognizing the importance of accurate market definitions.

Just as the 1991-1992 and 1994-1995 ADI market definitions would have differed, there will also be some differences between the 1991-1992 ADI and 1994-1995 DMA market definitions. Although those differences may be somewhat greater than might have been expected had ADI's continued to be available,¹² they are not so substantial as to warrant continued use of completely outdated market definitions. The Commission should adhere to its initial decision to update its market definitions with each election cycle.

Moreover, since there is an opportunity for stations to elect either mandatory carriage or retransmission consent every three years, signal carriage on particular cable systems has the potential for a triennial change regardless of the market standard which is chosen. The ultimate practical impact on subscribers associated with use of the optimally accurate DMA standard is thus likely to be negligible.

¹¹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order*, MM Dockets Nos. 92-259 *et al.*, FCC 93-144 (1993) at par. 39.

¹² Approximately 97 counties in 64 markets were assigned to different ADI's between the 1988-1989 and 1991-1992 (and two counties were split), and there is no reason to believe the number of reassigned counties would have been substantially different between 1991-1992 and 1994-1995. Approximately 122 counties would be affected by a change to DMA's. In other words, had ADI remained in business, there would in all probability have been a number of changes in ADI market assignments.

Prior ADI Modification Decisions Should Not Affect
The Outcome of this Proceeding

The *Notice* also raises the specter of an adverse impact on ADI modification decisions if DMA market definitions are adopted. Those decisions need not, and should not be affected by a change to the DMA standards. Decisions modifying individual television stations' markets for purposes of the must-carry rules are community-specific, not market specific.¹³ They depend on facts peculiar to individual situations and by their very nature are exceptions to general market definitions, no matter what definition is used. Thus, if a particular cable community has been determined to be a part of a station's market because of factors such as historical cable carriage, signal coverage, programming service or viewing patterns,¹⁴ that determination should remain valid regardless of the market definition generally used in administering the FCC's mandatory carriage rules.¹⁵

¹³ See, e.g., *Lima Communications Corp.*, 74 RR 2d 932 (MM Bur. 1994); *WOWT-TV*, 77 RR 2d 1462 (Cable Bur. 1995).

¹⁴ See, 47 U.S.C. § 614(h)(C)(ii).

¹⁵ If a particular community has been ruled to be outside a particular station's market but is now within the market due to use of the DMA instead of the ADI, the DMA standard would govern. (It is, in any event, unlikely that this will occur in many situations, and if it does, the affected cable systems or other interested parties would have an opportunity to seek appropriate special relief.)

Conclusion

Full implementation of Congress' intent in enacting must-carry requirements demands use of DMA markets in administering mandatory carriage requirements. There is no reason to delay this change for an additional three-year election cycle. Must-carry/retransmission consent elections must be made in October, 1996. Prompt resolution of this proceeding will afford more than sufficient time for television stations and cable systems to adjust their plans to the DMA standard. The Commission should adopt the DMA as the measure of television markets for must-carry/retransmission consent purposes and should make that decision effective immediately.

Respectfully submitted,

EVENING POST PUBLISHING CO.
HUBBARD BROADCASTING, INC.
PAXSON COMMUNICATIONS CORP.
WABASH VALLEY BROADCASTING
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